Supreme Court, U.S.
FILED
SEP 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-8

In the Supreme Court of the United States

OCTOBER TERM, 1986

GIOVANNI MASI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's motion for a new trial alleging newly discovered evidence was properly denied by the district court.

2. Whether the district court made findings of fact as to disputed allegations in the presentence report, as required by Fed. R. Crim. P. 32(c)(3)(D).

3. Whether the district court abused its discretion in denying petitioner's motion for reduction of sentence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B5) is unreported. The opinion of the district court (Pet. App. A1-A7) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1986. The petition for a writ of certiorari was filed on May 12, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiring to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. 846; aiding and abetting the distribution of cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2; and aiding and abetting the possession of cocaine with intent to distribute it, also

in violation of 21 U.S.C. 841(a) and 18 U.S.C. 2. Petitioner was sentenced to concurrent ten-year prison terms on all three counts and to additional concurrent ten-year special parole terms on the latter two counts (Pet. App. A3). The court of appeals affirmed, and this Court denied certiorari. 742 F.2d 1442 (2d Cir. 1984) (Table), cert. denied, 469 U.S. 1188 (1985).

Thereafter, petitioner sought a new trial on the ground of newly discovered evidence and on the ground that the district court had failed to make findings of fact regarding challenged portions of the presentence report, as required by Fed. R. Crim. P. 32(c)(3)(D). Petitioner also sought a reduction in his sentence pursuant to Fed. R. Crim. P. 35. The district court denied the motions (Pet. App. A1-A7), and the court of appeals affirmed (Pet. App. B1-B5).

1. Prior to sentencing, petitioner requested a hearing concerning various statements in the presentence report (8/19/83 Tr. 7). Specifically, petitioner challenged the characterization of him in the report as a major cocaine smuggler and dealer, as a methaqualone dealer and distributor in Florida, and as someone who was "capable of violent conduct." The hearing was held on August 19, 1983. Prior to hearing any testimony, the court noted that the seizure of several fully loaded, operable firearms from petitioner's apartment at the time of his arrest (a fact that had been adduced at the pre-trial suppression hearing) was more than sufficient indication that petitioner was "a man of violence" (*id.* at 6-9).

The government then put on testimony from three witnesses: a DEA agent and two of petitioner's former customers, Lucinda Sherman and George Bakke. Sherman testified that on numerous occasions prior to his arrest, petitioner sold her large quantities of methaqualone and cocaine (8/19/83 Tr. 51-52). On one occasion, she also observed petitioner selling cocaine to two uniformed Dade

County police officers inside petitioner's garage (*id.* at 62-63, 69-70). Petitioner told Sherman that he was capable of supplying virtually unlimited quantities of cocaine (*id.* at 62). Sherman also said that petitioner had several firearms and that he had carried one such firearm as a protective measure when he sensed danger from law enforcement officers (*id.* at 57-62). Bakke, the other civilian witness, provided further support for the statements in the presentence report. He testified that he had observed satchels of cocaine that petitioner and one of his associates had transported to the Long Island area. Petitioner had told Bakke that the cocaine was destined for customers in Boston and Philadelphia. In addition, both Sherman and Bakke reported that the cocaine petitioner distributed was in the form of round masses which, they were advised, had been smuggled into the United States by "body-carriers." 8/19/83 Tr. 52-53, 72-79.

On August 24, 1983, prior to sentencing, the district court made findings concerning the disputed statements in the presentence report. The court specifically found that petitioner was a substantial trafficker in cocaine and methaqualone and that he had been in possession of several loaded guns (8/24/83 Tr. 94-100).

2. After his conviction had become final, petitioner filed his motions for a new trial and for reduction of sentence. With regard to the motion challenging the presentence report and the sentencing proceeding, the court observed that it had conducted an extensive hearing concerning the presentence report and had made specific findings in compliance with Rule 32(c)(3)(D) (Pet. App. A5). With regard to petitioner's claim of newly discovered evidence, the court held that petitioner's vague and conclusory allegations were insufficient to show the nature of the evidence and how it became available only after trial (Pet. App. A6-A7). In response to the motion to reduce

sentence, the court found that petitioner's sentence was proper in light of the gravity of the offenses and the fact that petitioner was a danger to society (Pet. App. A5).

The court of appeals affirmed (Pet. App. B1-B5). The court examined the three DEA reports that petitioner claimed had been improperly withheld and found that those reports contained nothing that would lead to a different result at a new trial (Pet. App. B2).[1] In addition, the court found nothing of significance in petitioner's claim that his co-defendant, Giuseppe Cinelli, was now willing to discuss the case. The court pointed out that petitioner had "offer[ed] no evidence that anything Cinelli might say would significantly increase [petitioner's] chance of acquittal" (Pet. App. B3). The court also concluded that, contrary to petitioner's contention, the district court had made the requisite findings about the disputed facts in the presentence report, and that petitioner and his attorney had had an ample opportunity to read and comment on the presentence report prior to sentencing. Pet. App. B3-B4. Finally, the court concluded that the district court acted well within its discretion in denying petitioner's motion to reduce his sentence, since petitioner was a "major drug trafficker" who had been convicted of serious offenses (Pet. App. B5).

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[1] The reports were not part of the record in the district court. On appeal, the government produced the documents at the court's request. Two of the reports were prepared during the course of a DEA investigation into petitioner's methaqualone sales in Florida from late 1981 through September 1982, a period prior to that charged in the indictment. Included in the reports were Lucinda Sherman's statements about her purchase of cocaine and methaqualone from petitioner and her observation of petitioner's sale of cocaine to two Dade County police officers. The third report, dated January 17, 1983, was a personal history of petitioner prepared by one of the Miami DEA agents who arrested petitioner. It contained general biographical data about petitioner that was learned during the course of the investigation.

ARGUMENT

1. Petitioner's principal contention (Pet. 12-17) is that he was entitled to a new trial based on his post-trial discovery of three DEA reports that the government failed to produce at trial. He claims that those documents were material to his case and that, at a minimum, an evidentiary hearing was necessary to ascertain the impact they would have had at his trial. That claim is patently without merit.

To begin with, as petitioner concedes (Pet. 17), the information contained in the DEA reports related solely to evidence that was adduced at the sentencing hearing. The information was in no way material to the issues at trial. Moreover, after examining the documents, the court of appeals found that they contained nothing exculpatory (Pet. App. B2). Far from being helpful to petitioner, the documents contained incriminating information about petitioner's prior crimes that was consistent with the evidence presented at the sentencing hearing. Since petitioner's new trial motion was totally lacking in merit, there was no reason for the district court to hold an evidentiary hearing on the motion.

2. Petitioner next argues (Pet. 18-25) that the district court failed to make findings of fact concerning disputed portions of the presentence report, as required by Fed. R. Crim. P. 32(c)(3)(D).[2] Once again, even if petitioner's complaint about the sentencing proceeding were well founded, it would not have entitled petitioner to a new trial. In any event, however, petitioner's claim is squarely rebutted by the record.

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[2] Petitioner also maintains (Pet. 19-20) that he was not given an adequate opportunity to study the presentence report. Yet as the court of appeals found (Pet. App. B4), and as petitioner himself concedes (Pet. 19-20), petitioner read the presentence report on August 19, 1983, five days before his sentencing. Moreover, the court of appeals correctly noted (Pet. App. B4-B5) that petitioner's attorneys had an opportunity to read and comment on the report both on August 19,

After the evidentiary hearing on the presentence report, the district court found that the evidence established "that for a period of time [petitioner] has been selling quaaludes and cocaine. He has not been caught before this instance. He was not a law abiding citizen." 8/24/83 Tr. 98; see also 8/19/83 Tr. 84 (court found that statement in presentence report that petitioner was a major cocaine dealer and dealt in quaaludes was "amply supported by the record"). At the outset of the August 19 hearing, the court observed that petitioner had been caught with several loaded pistols when he was arrested and that such circumstances indicated that he was "a man of violence" (8/19/83 Tr. 7). The court later reiterated its conclusion that the evidence showed petitioner's violent nature (see 8/24/83 Tr. 97) (noting that petitioner was "a cocaine dealer who had loaded guns" and was not "just an ordinary individual * * * who [felt] he must protect his business"). Thus, contrary to petitioner's claim, the record shows that the district court made precisely the findings required by Fed. R. Crim. P. 32(c)(3)(D).[3]

1983, and on August 24, 1983, the date of the sentencing. The case of *United States* v. *Rone*, 743 F.2d 1169 (7th Cir. 1984), relied on by petitioner, is not to the contrary. In *Rone*, the defendant claimed that he had not been given an opportunity to review the presentence report prior to sentencing, and there was nothing in the record to demonstrate otherwise.

[3] Petitioner relies (Pet. 21-22) on four cases in support of his claim that the district court failed to comply with Rule 32(c)(3)(D): *United States* v. *Stewart*, 770 F.2d 825 (9th Cir. 1985), cert. denied, No. 85-5733 (Jan. 27, 1986); *United States* v. *Petitto*, 767 F.2d 607 (9th Cir. 1985); *United States* v. *Velasquez*, 748 F.2d 972 (5th Cir. 1984); and *United States* v. *Rone*, 743 F.2d 1169 (7th Cir. 1984). These cases do not even remotely support his claim. In each of them, the district court had erroneously imposed sentence without making *any* findings of fact as to disputed allegations in the presentence report.

Petitioner's final argument—that the district court abused its discretion in denying his Rule 35 motion for a reduction in sentence--is also without merit. As the court of appeals observed, the "evidence below demonstrated that [petitioner] was a major drug trafficker, and the offenses for which he was convicted [were] serious" (Pet. App. B5). Petitioner's sentence fell well within the statutory limits, and in light of petitioner's background and the nature of his offense, the district court was fully justified in denying the discretionary relief of a reduction in sentence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1986

U.S. GOVERNMENT PRINTING OFFICE: 1986—491-507/20325